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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 687

HASKINS BROS. & CO., a Corporation,
Petitioner,

v.

GEORGE W. O'MALLEY, individually and as Collector of Internal Revenue for the District of Nebraska,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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POINT I.

NEITHER DOWNES v. BIDWELL NOR PRIOR REVENUE ACTS RELIED ON BY THE GOVERMENT SUPPORT ITS CONTENTION THAT THIS IS A VALID EXERCISE OF THE TAXING POWER.

The Government in its brief both in this case and in the companion case (No. 659) leans heavily upon "a series of statutes" said to be "almost identical with the present Act". It also cites *Downes* v. *Bidwell,* 182 U. S. 244. Neither that case nor the statutes referred to lend support to the tax in dispute as one levied to pay the debts or to provide for the common defense and general welfare of the United States.

1. Downes v. Bidwell.

The only question presented in *Downes* v. *Bidwell, supra,* was whether Porto Rico was a part of the United States, so as to make the Uniformity Clause of Art. I, Sec. 8, Clause 1 of the Constitution applicable. The question presented in the instant case was neither raised, discussed, nor decided.

The case is probably cited because the taxes in dispute were import taxes collected in the United States under the Foraker Act (31 Stat. 77) on articles brought into the United States from Porto Rico, the proceeds of which were required to be "placed at the disposal of the President", to be used "for the government and benefit of Porto Rico until the government of Porto Rico, herein provided for, shall have been organized", at which time unexpended monies collected under the provisions of the Act were required to be transferred to the local treasury of Porto Rico. Prior to the Foraker Act, Porto Rico had been under military rule. That Act, approved April 20, 1900, set up a civil government for the Island.[1] The import taxes involved in *Downes* v. *Bidwell,* which were to be used for the support of the Porto Rican government, were of a purely temporary character, and were intended to provide for the government of the Island only until the new civil government had provided for the collection of its own revenues by

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[1]**The civil government provided for by the Foraker Act was to consist of a Governor (Sec. 17, 31 Stat. 81), an Executive Council to be appointed by the President (Sec. 18 *Ibid*), and a Legislative Assembly to consist of two Houses, of which one should be the Executive Council and the other a House of Delegates to be elected by the qualified voters of the Island (Sec. 27 *Ibid*).**

local taxation, and in no event were to continue beyond March 1902.[2] The Act further provided that Congress should have the power to annul any Act of the Legislative Assembly (Sec. 31, *Ibid* 83).

At the time of the enactment of the Foraker Act, it was the duty of the United States to provide a government for Porto Rico and support it. A tax levied for the temporary support of the government of the islands, with power in the United States to control disposition of the proceeds, bears no resemblance whatsoever to the tax in dispute, all of whose proceeds are required to be paid over to the autonomous government of the Philippine Islands, whose government has been self-supporting for more than a quarter of a century, which had been given their independence at the time of the passage of the Act, and towards whose people the United States is no longer under any duty to provide a government or to support it.

Downes v. *Bidwell* is no authority for the validity of the tax in dispute.

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[2]Sec. 3 of the Act (p. 58) provides specifically as follows:

> "• • • and whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this Act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico."

2. The prior revenue acts relied on by the Government are without legal significance.

As we shall hereinafter demonstrate by considering these statutes in some detail, they are not at all identical with the present Act. The taxes laid by them were quite different in nature from ours, none being internal revenue taxes on activities within the United States. The situation and status of the Philippine Islands during the seven year period of operation of the Act of March 8, 1902, c. 140, 32 Stat. 54, Sec. 4 (U. S. C., Title 19, Sec. 123a), which was the only one levying an import tax in the United States, was entirely different from the status of the Islands under the Jones Act of 1916, which was the first organic act for this territory, and of course wholly different from the situation and status of the Islands under the Philippine Independence Act. The other statutes levied mere stamp taxes in lieu of Philippine internal revenue taxes, practically all collections being made in the Islands. Moreover, the amounts collected under these various Acts were inconsequential when compared with the total revenues raised in the Philippine Islands, whereas our tax has in the space of three years raised more than enough to pay off the entire Philippine national debt.

Before entering upon a detailed discussion of the provisions of this series of statutes, it should be noted that in any event they are of little, if any, legal significance as precedents in determining the validity *vel non* of our statute. Exercise of such supposed legislative authority by Congress is not as the Government claims any evidence of the constitutionality of the practice. The only authorities cited by the Government for its contention are *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472, 473, and *United States* v. *Curtiss-Wright Export Corp.*, No. 98 October

Term, 1936, decided December 21, 1936, 57 Supp. Ct. 216 (so-called *Chaco* case). Neither of these cases is in point. In the *Midwest Oil* case, this court merely held that when Congress, having the powers of a proprietor over the public domain, had permitted the President from an early period in the history of the Government to withdraw public lands opened for occupation so long as they remained unappropriated, it would be taken to have assented to the practice. There is no principle prohibiting Congress from delegating its proprietary powers in connection with the public domain to the President. In this respect it is like a private proprietor. Moreover, the practice in question and Congressional acquiescence extended back to the beginnings of our Government, whereas in our case the first of the statutes relied upon by the Government was passed in 1902. The same is true of the Presidential practice with respect to foreign relations which is involved in the *Chaco* case, which, moreover, stands also on an entirely independent basis.

In determining the weight, if any, to be given to practical construction by Congress of the Constitution, certain inapplicable principles should be noted and distinguished. We are not concerned with the principle that property rights acquired on the faith of a long-continued and uniform administrative or legislative construction of a statute or constitutional provision should not be lightly disturbed. Nor are we concerned with the legislative or administrative construction of ambiguous statutes or statutes of doubtful meaning, chiefly, if not entirely, so-called "administrative statutes", long acquiesced in. And, of course, there cannot be applied to our case the principle that in the construction of constitutional provisions, the practice of the first Congress or early Congresses, composed for the most part of members of the constitutional or ratifying conventions,

should be entitled to great weight. None of the foregoing principles apply, and we have not been able to discover any cases which lend authority to the proposition that any weight should be attached to the series of statutes which the Government cites as precedents for the instant statute.

3. The taxes imposed by the Acts referred to and the circumstances of their imposition are distinguishable.

The first of the "series of statutes" referred to by the Government is the Act of March 8, 1902 (32 Stat. 54). This Act, like the Foraker Act for Porto Rico, levied import duties upon goods imported into the United States from the Philippine Islands, the proceeds of which were required to be "paid into the treasury of the Philippine Islands", to be used and expended for the government and benefit of the Islands. The Act was entitled "An Act temporarily to provide revenue for the Philippine Islands, and for other purposes". At the time of its enactment the Islands were still in a state of insurrection,[3] and were being governed by the War Department through the Philippine Commission. They continued to be so governed until October 16, 1907.[4]

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[3]See recitals of Sec. 6 of "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands—and for other purposes" (32 Stat. 691, 693)—approved July 1, 1902.

[4]The Act of July 1, 1902 provided (Sec. 6) that "whenever the existing insurrection in the Philippine Islands shall have ceased, and a condition of general and complete peace shall have been established therein", a census should be taken, and that (Sec. 7) two years after the completion of the census the Philippine Commission, if so directed by the President, should call a general election for the choice of

The import duties imposed by the Act of March 8, 1902 continued to be collected for a little less than two years after establishment of civil government in the Islands, when they were superseded by import duties imposed by the Tariff Act of August 5, 1909. With the passage of this Act collection of import duties in the United States on Philippine products practically ceased by reason of the liberal provisions which it made for free entry of Philippine products.[5]

As in the case of the Foraker Act, the provision contained in the Act of March 8, 1902, by which the proceeds of import duties on Philippine products brought into the United States were to be used for the support of the Philippine Government, was enacted under circumstances wholly different from those surrounding the imposition of the tax in dispute. The Islands had but recently come into the pos-

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delegates to the Philippine Assembly, the latter to constitute one of two houses of a Philippine Legislature, of which the other should consist of the Philippine Commission. The first election under this law was held July 30, 1907, and the first Philippine Assembly convened on October 16, 1907 (Report of Philippine Commission, 1907, p. 6).

[5]The statement in the Government's brief in the companion case that collections under the Act of March 8, 1902 had amounted to $3,834,513 by 1930, is, standing by itself, misleading. The same table from which this figure is taken (Table 36, United States-Philippine Tariff and Trade Relations, U. S. Tariff Commission 1931, p. 121) shows that collections under this Act practically ceased in 1909, the aggregate of the import duties collected thereunder since 1909 being but $187,249, and those for the last year shown in the table (1930) $1,577. The statement in the Government's brief that the Tariff Act of 1909 provided that import duties on Philippine products should be paid to the Philippine Government is not correct. In the absence of such a provision it may be doubted whether such payments subsequent to 1909 have been authorized, but the amounts are inconsequential, as shown above.

session of the United States, whose duty it was to provide a government for them and to support that government. The insurrection had not been wholly quelled. Civil government had not been established and the Islands were being governed by the War Department through the Philippine Commission, and continued to be governed by such Commission for a period of more than five years. Such import duties continued to be collected for a little less than two years after the establishment of civil government—in which, however, the Philippine Commission constituted the upper house of the Legislature. Sec. 86 of the Act of July 1, 1902 (32 Stat. 712), by which such civil government was established, provided as follows:

> "SEC. 86. That all laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same, and the Philippine Commission is hereby directed to make annual report of all its receipts and expenditures to the Secretary of War."

The imposition of import duties to be collected within the United States for the support of the Philippine Government under such circumstances bears no resemblance whatsoever to the imposition of the tax in dispute, all the proceeds of which are to be paid over to the autonomous and self-supporting government of the Islands, which have been given their independence subject to the exercise of certain limited powers by the United States, to be used by such government as it pleases, and yielding a revenue of approximately $14,000,000 per year.

The Government also refers to certain provisions contained in the Tariff Acts of August 5, 1909, *supra*, of

October 3, 1913 (38 Stat. 114, 193), of September 21, 1923 (42 Stat. 858, 935) and of June 17, 1930 (46 Stat. 590, 686). Of these Acts, the Tariff Act of 1930 was the one in force at the time of the imposition of the tax in dispute, and its provisions are substantially identical with those of its predecessors. Sec. 301 of that Act (46 Stat. 686) provides that on articles raised or manufactured in the Philippine Islands, which shall come into the United States, a stamp tax shall be imposed equal to the internal revenue tax imposed in the United States upon like articles of domestic origin, and that such articles, shipped from the Islands to the United States, shall be exempt from the payment of any tax imposed by the internal revenue laws of the Philippine Islands. It contains a reciprocal provision subjecting articles shipped to the Islands from the United States to a tax equal to the internal revenue tax imposed in the Philippines upon like articles, and exempting such articles from the payment of internal revenue taxes within the United States. It further provides that all internal revenues collected *in* or for account of the Philippine Islands shall be paid into the insular treasury. From the beginning, practically all of these taxes have been collected within the Philippine Islands.[6]

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[6]The Government in its brief in the companion case refers to the fact that between 1910 and 1929 proceeds of internal revenue taxes on Philippine products levied under this series of the Tariff Acts amounted to $11,324,594 (United States-Philippine Tariff and Trade Relations, U. S. Tariff Comm. 1931, p. 121). The same table discloses that of this sum $11,136,016 were collected in the Philippines and but $188,578 in the United States.

The Report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1923, the last fiscal year preceding the imposition of the tax in dispute discloses (Table 7, p. 64) that in that year Internal Revenue taxes imposed

The revenues accruing to the Philippine Government under this tax were therefore revenues derived from an internal revenue tax collected in the Philippine Islands on Philippine products in lieu of internal revenue taxes, which might otherwise have been imposed within the Islands upon the same products and for the support of its government, but which the Philippine Government was prohibited from imposing. In substance, the tax was an internal revenue tax levied in the Islands on its own products for the support of its own government. Such a tax bears no resemblance to the tax in dispute. Moreover, if it did, there is clearly a marked difference between a tax yielding approximately $300,000 a year and a tax yielding approximately $14,000,000 a year, appropriated in advance to an autonomous Philippine Government, to do with as it pleases.

The same document from which the figures contained in the Government's brief were taken shows total receipts by the Philippine Government from taxes of all sorts in the year 1929 aggregating $33,857,930 (Table 34, p. 120), of which $355,000 were derived from the internal revenue tax in question, practically all of which was collected within the Philippine Islands themselves. In other words, the proceeds of this tax represented approximately 1% of the revenues of the Philippine Government from all forms of taxation. The annual revenues derived from the tax in dispute, on the other hand, represent approximately 40% of the normal receipts of the Philippine Government from all forms of taxation. Assuming, without conceding, that

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by this section on Philippine products coming into the United States amounted to $328,444.33. The same report (Table 4, p. 60) discloses that of this amount substantially all ($328,072.26) was collected in the Philippine Islands.

as long as the Philippines were to remain a possession of the United States, Congress could appropriate for the use of the Philippine Government any amount it saw fit, it would seem to be plain that a tax levied within the United States upon its citizens, yielding $14,000,000 or $15,000,000 per annum, appropriated in advance to the Philippine Government, to do with as it pleases, cannot be sustained either as a tax levied to pay the debts or to provide for the common defense and general welfare of the United States, or as one required to prevent the breakdown of orderly government in the Philippines, or to enable the Government of the new Commonwealth, properly to perform its functions. This is especially so in view of the fact that the Philippine Government is and long has been self supporting. Clearly, under the conditions created by the Independence Act, any appropriation to the Philippines must be measured with some regard to its necessities, and it is beyond the power of Congress to make a gift to the Philippines of so large a sum extracted from the citizens of the United States.

The nature of the taxes relied upon by the Government and the circumstances under which imposed clearly distinguish them from the tax in dispute. They afford no justification whatever for a contention that the tax in dispute may be sustained as one to pay the debts or to pay for the common defense or general welfare of the United States. Even assuming, therefore, that weight may be given to a legislative interpretation of constitutional provisions, the nature of these taxes, the circumstances under which they were levied, and the amount yielded, were so different from the nature of the tax in dispute, the circumstances under which it was imposed and the amount yielded thereby, as to deprive them of all value as precedent.

POINT II.

THE CONSTITUTIONAL POWER OF CONGRESS TO GOVERN AND TO MAKE RULES AND REGULATIONS FOR THE TERRITORIES OF THE UNITED STATES DOES NOT JUSTIFY THE CONTRIBUTION OF FIFTY MILLION DOLLARS EXTRACTED FROM THE PEOPLE OF THE UNITED STATES TO THE TREASURY OF THE AUTONOMOUS GOVERNMENT OF THE COMMONWEALTH OF THE PHILIPPINE ISLANDS WITHOUT EVEN DESIGNATING THE GENERAL PURPOSES FOR WHICH IT MUST BE SPENT.

We do not quarrel with the Government's contention that Congress may fulfill the constitutional requirements for an appropriation without being very precise or specific in designating the objects and purposes for which the moneys may be spent by the Executive Department of the United States Government. In two most important respects, however, the situation which confronts the Court in this case is totally different from the situations, statutes and cases cited by the Government. In the first place, the Government does not advance its case by the contention that the purposes and objects of Congressional spending may be designated with considerable generality without impairing the constitutionality of the measure. It must argue that a statute is constitutional which provides for the spending of moneys without even a general specification of the purposes and objects to guide those who are to make the expenditures. In the second place, it must argue, assuming that the Executive Department of the United States

Government could be accorded by Congress such an unlimited power, that a like delegation can be made to the autonomous Government of the Commonwealth of the Philippine Islands to spend in its untrammeled discretion. Neither of these contentions—both of which the Government is called upon to sustain in order to carry its point—can be upheld either in principle or upon the authorities the Government cites.

With respect to the necessity of the designation by Congress of at least a general purpose to guide the Executive Department in its expenditures of public moneys, the Government has, in two of its recent briefs in this Court, virtually conceded the point. In its brief (p. 101) in *United States* v. *Butler*, No. 401, October Term, 1935 (297 U. S. 1), Government counsel stated:

> "It may be that the appropriation must specify a purpose. For example, if a grant of funds were made, not specifying any purpose whatsoever, it might not be a sufficient exercise of the duty placed upon Congress by Article I, Section 9, Clause 7 of the Constitution."

In *Duke Power Co. et al.* v. *Greenwood County et al.*, No. 32, October Term, 1936, Government counsel said (at p. 136):

> "When Congress appropriates money for designated purposes, the problem is not the control of coercive power *but the establishment of standards sufficiently definite to insure that the money is applied for the purposes for which it was intended* and, at the same time, sufficiently reasonable and elastic to permit the executive to apply the money efficiently to those purposes." (Emphasis ours.)

This agrees with Alexander Hamilton's opinion (set forth at page 51 of our main brief) as follows:

> "to secure these important ends,—that the *purpose*, the *limit*, and the fund of every expenditure *should be ascertained by a previous law.*" (Italics ours.) [Hamilton's Works (Ham. Ed.), VII, pp. 532, 533.]

It is to be noted that our statute does not even devote the proceeds of this exaction to the proper governmental purposes of the Government of the Commonwealth of the Philippine Islands. As has been commented upon in our main brief, the purpose of Congress was to take the money away from the United States Treasury and to give it to the Philippine Government without restriction as to purpose, since Congress was satisfied that it be spent for any purpose at all except for the one purpose of subsidizing producers of cocoanut oil in the Philippines.

As to the second point which the Government must sustain in order to justify this delegation of Congressional spending power, its reliance is upon the cases of *United States* v. *Heinszen & Co.*, 206 U. S. 370, and *Dorr* v. *United States*, 195 U. S. 133. The argument is that these cases establish the power of Congress to legislate for the territories of the United States, either by laws of its own or by designating instrumentalities or agencies to govern in its place and stead. In this way the Government seeks to justify Congressional failure to comply with even the minimum standards for the appropriation of public moneys.

But the cases cited do not justify the stand taken by the Government in this case. The *Dorr* case held no more than that Congress had the right to authorize for the Philippine

Islands a temporary government of the character of the Philippine Commission and to delegate to that government the power to pass laws for the government of the Philippine Islands, the point in the particular case being the validity of a libel law passed by the Philippine Commission. (*Dorr* v. *United States,* 195 U. S. 133, at p. 153.) The case did not hold that Congress could delegate to an autonomous Philippine Government the power to make laws for the disposition of public moneys raised from taxpayers in the United States, upon which disposition Congress had put no limits whatsoever.

A still narrower point was involved in the *Heinszen* case. Subsequent to the ratification of the treaty of peace with Spain but prior to March 8, 1902 when Congress had enacted tariff laws for the Philippine Islands, import and export duties had been levied upon imports into and exports from the Philippine Islands, pursuant to executive orders of the President of the United States. In 1906 Congress had ratified the action of the President in levying these duties. The Court held that, since Congress in the first instance could have authorized the President to levy these duties, it had the power to ratify them. Here again the delegation sustained was to a properly selected instrumentality, the President of the United States. In the *Dorr* case it had been to the Philippine Commission. In our case it is to the autonomous Government of the Commonwealth of the Philippine Islands. In both of these cases the issue concerned a governmental regulation in the Philippine Islands,—in the one case a local libel law, and, in the other case, import and export taxes upon imports into the Philippine Islands and exports out of the Philippine Islands. In our case the question at issue is the constitutional propriety

of permitting an autonomus Government to dispose in any way it sees fit of the public funds of the United States amounting to $14,000,000 a year, raised from the United States taxpayers and turned over to the Philippine Government without any designation by Congress as to the purposes and objects for which it may be spent.

Respectfully submitted,

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